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July 6 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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IN THE SUPREME COURT OF THE STATE OF MONTANA  
NO.

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THE OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

v.

HON. JIM BAILEY,  
Ravalli County Justice of the Peace,

Respondent,

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**PETITION FOR WRIT OF MANDAMUS**

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The Office of State Public Defender (hereafter OPD), petitions this  
Court as follows:

1. OPD was created by Title 47 of the Montana Code Annotated.
2. The respondent, the Hon. Jim Bailey, is one of the duly elected  
Justices of the Peace in Ravalli County, State of Montana.
3. Pursuant to §47-1-104(4), beginning July 1, 2006, any court in this  
state, such as respondent, could order OPD to assign counsel in a

felony or misdemeanor for which there is a possibility of incarceration. §47-1-104(4)(a)(i), MCA.

4. Pursuant to §47-1-111(1)(a), when a court, such as respondent, orders OPD to assign counsel, OPD is to immediately assign counsel prior to determining whether the individual qualifies for services.
5. Pursuant to §47-1-111(1)(b), MCA, OPD is required to immediately notify the court, such as respondent, when a person for whom counsel has been assigned is later determined to be ineligible for public defender services.
6. It is the practice of OPD, once it receives a financial affidavit from an assigned client, to immediately file a motion to rescind, accompanied by an order of rescission, if the person fails to qualify, for any reason, under the statute or the policies of OPD, on indigency.
7. §47-1-111(1)(d), MCA, specifies that any determination made by OPD, pursuant to this section is subject to the review and approval of the court.
8. Pursuant to the policies of OPD, when a motion to rescind is filed on a client, petitioner sends a letter to the client advising them that

they do not qualify and that they can ask the court to review the decision that they do not qualify. (Exhibit A attached).

9. Despite the statutory language, which is mandatory, that any determination pursuant to §47-1-111(1)(d), MCA, is subject to the review and approval of the court, respondent refuses, when someone comes in who has been determined not to qualify, to give them a rescission hearing to determine if petitioner's decision should be overturned.
10. Respondent tells such individuals, after signing a rescission order based on the motion filed by OPD, that he does not conduct rescission hearings and sends them back to OPD to "reapply".
11. Unless an applicant's financial situation has changed, OPD cannot reconsider their application. This is because, pursuant to §47-1-111(5), MCA, OPD may only change the determination if additional information becomes available or if the applicants financial circumstances change. When people come back and submit the same application, which is what happens, the petitioner cannot change the determination that has been made because there is no additional information or the applicant's financial circumstances have not changed.

12. §27-26-102(1), MCA, provides, in pertinent part:

“A writ of mandamus may be issued by the Supreme Court . . . to any lower tribunal . . . to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust, or station.”

13. Here, petitioner is seeking a writ directed to respondent to compel

respondent to perform an act that the law specifically enjoins,

under Title 47, for him to perform, which is a review of rescission

requests, by an applicant, for OPD services, when they ask for such

a review.

14. Petitioner, nor any individual charged in respondent's court, who

has been determined by OPD not to qualify, does not have a plain,

speedy, and adequate remedy in the ordinary course of law, as

required under §27-26-102(2), MCA, for a writ to be granted,

because there is no process to review these decisions by

respondent, when respondent refuses to conduct hearings of any

kind or reviews of any kind.

WHEREFORE, petitioner prays as follows:

1. That this Court grant this writ of mandate and compel respondent

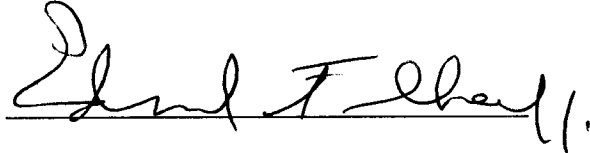
to either hold a rescission hearing or review, in same fashion,

OPD's rescission decision and not tell people to "reapply", when

their circumstances have not changed.

2. For attorneys fees in having to bring this action.
3. For such other relief as is just and equitable.

Dated this 30 day of June, 2010

A handwritten signature in black ink, appearing to read "Edmund F. Sheehy, Jr.", written over a horizontal line.

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